Supreme Court, U.S.
FILED
NOV 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-250

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MANUEL L. REAL, CHIEF JUDGE,
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Petitioner,

v.

STEPHEN YAGMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONER

I. INTRODUCTION.

Respondent's brief in opposition completely misses the point of the petition for certiorari. Indeed, the brief both mischaracterizes the record and effectively misstates the question presented. This Court is *not* being asked to determine whether the award of defendants' attorneys' fees was a proper response to an abuse of the judicial process, or whether Yagman is only a "zealous civil rights advocate." (Respondent's Brief at 15). That claim is nei-

ther the fact nor the issue. Rather, the issue presented is whether the court of appeals had the power, after finding every material fact in support of Judge Real's continued qualification to sit as the judge in the case, to remove him from the case in the exercise of an unfettered discretion. It is this purported distinction between statutory disqualification and constructive disqualification (reassignment) that merits this Court's scrutiny.

To paraphrase the words of the opinion below, the recusal of a district judge in a case in which he has been found to have acted fairly can only "send shivers through the [judiciary]." (App. 49a). Such a procedure dissuades even the fairest and most impartial judge from making difficult decisions as best he sees them, for fear of removal at the unlimited discretion of an appellate panel. The end result is contrary to law, judicial policy, and the checks and balances that are fundamental to the American system of government.

While Yagman's version of this litigation is irrelevant to these observations, the Court should not be misled by the rhetoric in Yagman's brief, which neither fairly nor accurately characterizes the facts of the case.* In attempting to imply that the sanctions award constituted some alleged punishment for his self-described civil rights advocacy, Yagman's brief omits to mention *any* of the facts in the record that demonstrate the falsity of that assertion, including the facts on which the court below expressly relied to support its findings that Judge Real acted fairly in the matter. (*E.g.*, App. 41a). The truth is that any number of judges, including appellate judges, have had occasion to criticize instances of seri-

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* For example, the assertion that the underlying defamation action was reassigned to Judge Real "on the eve of trial . . . without notice to plaintiffs" is apparently intended to suggest some impropriety. In so doing, Yagman simply omits any mention of the fact that the reassignment of Judge Lydick's entire calendar was necessitated by a severe illness. (App. 30a).

ous misconduct by Yagman, which have never seen within the accepted standards of the civil rights bar. *See Hamblen v. County of Los Angeles*, 803 F.2d 462, 464-65 (9th Cir. 1986) (Nelson, Hall, and Kozinski, J.J.) (attorney's fees and double costs on appeal to be paid by Yagman and his firm; "we take this opportunity to advise Mr. Yagman that continued failure to abide by [Ninth Circuit rules] may result in formal disciplinary proceedings"); *Tomer v. Gates*, 811 F.2d 1240, 1242-43 9th Cir. 1987) (Kennedy, O'Scannlain, and Wilkins, J.J.) ("Mr. Yagman has previously been admonished by this court," and failure to withdraw knowingly meritless argument was "unbecoming a member of the bar of this court"). If pointed criticism of Yagman's misconduct were a sufficient basis on which to disqualify a judge—and nothing more was ever found in this case—many judges other than petitioner would have to be recused from cases in which Yagman may appear.

For these reasons, and for the reasons stated below, Yagman's opposition fails to present any persuasive basis for the denial of certiorari. In contrast, the questions presented by the petition raise substantial issues of federal court administration, issues that require this Court's attention.

II. THE COURTS SHOULD NOT CREATE A "REASSIGNMENT" POWER THAT NULLIFIES THE CAREFUL BALANCE EMBODIED IN THE DISQUALIFICATION STATUTES.

Congress has specifically addressed the issue of judicial disqualification in two statutes, each of which sets forth, with care and precision, the grounds on which a federal district judge may be disqualified from hearing a particular case. 28 U.S.C. §§ 144, 455. Judicial decisions have further defined and qualified these statutory grounds. For example, it is clear that in order to justify disqualification under Section 144, the bias or prejudice exhibited by a judge "must stem from an extrajudicial

source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *see, e.g., Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1051-52 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (inquiry must focus on bias or prejudice against a party, rather than counsel). Similarly, Section 455 requires an objective test of reasonableness, so that recusal is not required in response to spurious charges or incomplete evidence. *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 716 (7th Cir. 1986); *In re Martin-Trigona*, 573 F. Supp. 1237 (D. Conn. 1983), *appeal dismissed*, 770 F.2d 159 (2d Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986) ("appearance of partiality" test is one of reasonableness, and does not require recusal in response to spurious charges).

Various courts of appeals have sought to avoid these carefully drawn and limited grounds for disqualification by relying on the purported right to reassign cases at the time of remand, a procedure whose draconian effect is fully equal to that of disqualification itself. However, no court has successfully articulated any reasonable basis to support the existence of this presumed power, and indeed no two courts have been able to agree on its origin, purpose, or scope. The result has been a hodgepodge of artificial rationales, all aimed at justifying the existence of an "inherent power" for which no statutory authority exists, and which flies in the face of the criteria established by Congress for disqualifying judges.

Nowhere is the pernicious effect of this ad hoc improvisation more clearly evident than in the present case. In some of the earlier reassignment cases, there was at least some hint of conduct that might have justified disqualification under the statutory criteria, if such an inquiry had been pursued. In the present case, how-

ever, the panel expressly found that it would *not* be authorized under constitutional or statutory standards to take Judge Real off the case, but nevertheless directed that Judge Real be removed. Under the rationale of this decision, any appellate court may remove a district judge on any given day, providing that two panel members conclude that their action can be explained under the rubric, "appearance of justice." *No* standard can be synthesized from the cases, *no* quantum of evidence is needed, *no* motion, notice, or opportunity to be heard is provided, and *nothing* in the way of objective requirements has been clearly articulated at any time.

This sad and truly remarkable state of affairs would have been avoided had the courts of appeals, including the panel below, been willing to accept and abide by the standards set down by Congress for disqualifying judges. Instead, these courts have arrogated to themselves an "inherent power" of removal that they can neither adequately support nor define, and in doing so have casually ignored congressional mandates and exceeded their own lawful power. Specific statutory enactments should not be avoided or nullified by judicial "interpretation" of general grants of authority, where there is no clear legislative authorization to do so. *See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, —— U.S. ——, 107 S. Ct. 2494, 2499 (1987); *see also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) (in absence of a constitutional basis for disqualification, judicial qualification issues involving bias, interest, or other policy would seem to be matters of legislative discretion). Congress having adopted standards and procedures on the subject of judicial recusal, appellate panels should not—and should not be permitted to—set them aside in promoting their own vague notions of an "appearance of justice."

III. THE APPEARANCE OF JUSTICE IS INJURED, RATHER THAN AIDED, BY THE STANDARDLESS EXERCISE OF REASSIGNMENT POWER.

The growing tendency to order reassignments is inconsistent with sound judicial policy. Although the panel below purported to be motivated by its view of "the appearance of justice," the fact is that the appearance—and reality—of justice are instead being harmed by reassignment practices.

Consider first the effect of such orders on public perceptions. When a reassignment is divorced from any issue of a disqualifying relationship to the case, the public naturally concludes that such an "unusual" step reflects serious criticism of the district judge. Those perceptions are scarcely erased by pious disclaimers in the opinion accompanying the reassignment order, and necessarily engender doubts concerning the judge's handling of other cases, while creating the impression of a "feud" between the district judge and the court of appeals. None of these effects is beneficial to the federal court system as a whole.

In addition, the exercise of the purported power of reassignment encourages a new and particularly objectionable type of "forum shopping." Here, Yagman was able to achieve his desired result—a new judge—through a series of published newspaper interviews, including statements that commented insultingly on Judge Real's mental competence. Such a situation was foreseen by Judge Richey in *Koller By and Through Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1069 (D.C. Cir. 1984) (Richey, J., concurring), *vacated and remanded sub nom. Richard-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), when he warned that reassignment opens "[a] 'Pandora's Box' for countless, baseless attacks upon a defenseless judiciary . . . ."

In expressing concern with the "chilling" impact of sanctions awards, the court below unaccountably failed to show a similar solicitude for the effect of reassignment orders. Such practices must inevitably "chill" the independent exercise of judicial discretion in the district courts. Writing on the topic of judicial independence, Judge Irving Kaufman observed that such independence must be protected from encroachments by other judges, as well as from the legislative or executive branches of government. Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 690 (1979). Judge Kaufman concluded that a judge must be assured

> that the only indignity he may suffer for error is reversal. *In short, he must be certain that disagreeable views will not lead to personal punishment.*

Id. at 690 (emphasis added).

Reassignment imposes just such a personal punishment, and a stigma that is not carried by mere reversal. The potential threat of a reassignment thus interferes with the normal exercise of discretionary authority, as a trial judge must now consider whether his or her decisions may be sufficiently objectionable to any given appellate panel that it may choose to remove the judge from the case. As Justice Douglas observed more than 16 years ago, in dissenting from the decision not to hear the merits of Judge Chandler's appeal from an "administrative disqualification" by the judicial council,

> The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible . . . and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like . . . .

> *These are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good . . . .*

Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting) (emphasis added).

In this case, the appellate panel expressly refused to consider any of the above considerations in opposition to its reassignment decision. (App. 3a-4a). Such considerations, however, clearly do warrant review by this Court.

IV. THE DIFFERENCES AMONG THE CIRCUIT COURT OPINIONS SHOW THE NEED FOR INTERVENTION BY THIS COURT.

Although the opposition asserts that the circuit court opinions speak "with one voice," Respondent's Brief at 13. this conclusion is belied by the cases cited. *Id.* at 12-13. In substance, Yagman admits that the courts of appeals have adopted conflicting theories in support of their desired end result, variously purporting to find the power within Section 1651(a) or Section 2106 of Title 28, or within generalized notions of "inherent," "implied," or "supervisory" power. Moreover, Yagman's opposition is silent with respect to the widely differing descriptions of the scope of the power as stated by the different circuits in reassignment cases.

In truth, the courts of appeals appear to be united *only* in the belief that if a reassignment power does not exist, it should be created! No two courts seem to agree, however, on the origin, purpose, or scope of the presumed power. Under these circumstances, the purported "unanimity" among the circuits is not a basis on which to decline review here.

Yagman also cannot take comfort from *Calvaresi v. United States*, 348 U.S. 961 (1955). (Respondent's Brief at 15-16.) As previously observed, Petition at 9, this

Court's ruling in *Calvaresi* must be read in context with the issue of judicial disqualification presented in that case under 28 U.S.C. § 144. *Calvaresi v. United States*, 216 F.2d 891, 900 (10th Cir. 1954), *rev'd*, 348 U.S. 961 (1955).

The simple fact is that this Court has never spoken to the questions presented by the petition. In the absence of any express authority, reliance by the courts of appeals on their own prior cases has the district appearance of "bootstrap" logic. Since the trend toward increasingly frequent reassignments is presently unchecked by any limiting factors, this Court's intervention is required.

V. CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 17, 1987